

‘Establishment of the Commission for Equality and Human Rights: implications for the public sector’

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Today I will take us through the proposed human rights powers and duties laid out in the Government response to the White Paper² on the proposed Commission for Equality and Human Rights (CEHR) and will discuss the implications of these for public authorities.

What is the CEHR for and why human rights?

The CEHR is often presented as six or seven ‘strands’ or an amalgamation of the three existing Commissions³ plus three or four new strands. In fact, what is being established is a Commission for Equality *and* Human Rights, which is not just more than the sum of its parts but has a champion, promotional and compliance role that extends far beyond the legislation on race, gender, disability, age, religion and belief and sexual orientation which it is specifically charged with enforcing. For example, if someone complained of discrimination by a public authority on the grounds of language or on the grounds of caring responsibilities, they wouldn’t be turned away just because our anti-discrimination legislation does not directly address these issues. The CEHR would be able to give advice to the individual concerned (and/or public authority) on their rights under the Human Rights Act (HRA) and would be able to intervene in any resulting HRA litigation. Likewise, an inquiry into Anti-Social

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² DTI, *Fairness for all: A New Commission for Equality and Human Rights: The Government Response to Consultation*, November 2004.

³ Commission for Racial Equality, Equal Opportunities Commission and Disability Rights Commission.

Behaviour Orders would not just be confined to issues of discrimination, as such, but could include issues of dignity, privacy, community relations and due process and their impact on young people in particular.

CEHR human rights powers

There are two important framework proposals that govern the application of the specific human rights powers and duties of the CEHR.

Integrated equality and human rights work

- The advice function will not be limited to advising on anti-discrimination provisions only. Whether through a CEHR helpdesk, website or funding/supporting partnership bodies like CABS, advice can be given on the HRA alongside equality legislation.
- In supporting or taking cases under the discrimination legislation it will be possible to raise a potential breach of the HRA. For example, a potential breach of the right to liberty in a case on stop and search powers discriminating on grounds of race or religion, or a potential breach on the right to privacy or family life in a case on discrimination on grounds of disability or age in the health service.
- In conducting an inquiry into, say, prisons or pregnancy, the terms of reference can be extended to include human rights issues like family life, privacy, free expression, dignity etc.
- In promoting good practice and respect for diversity and equality among public or private authorities (whether or not the latter are defined as public authorities under the HRA) the CEHR will also be duty bound to promote respect for human rights.

Promoting and protecting human rights

Second, CEHR provides the first institutional support for the Human Rights Act. This is often described as a promotional role although in practice its mandate will be wider than this implies. In addition to promotion, CEHR will have advice, 'smart compliance,' enquiry and case intervention powers (see below). Although some prioritisation will be given to the rights in the European Convention on Human Rights (ECHR) incorporated in the HRA, the Commission will be required to promote *all* human rights, including those drawn from other international human rights treaties and declarations.

Specific human rights powers and duties of the CEHR

1. Duty to promote understanding of the importance of human rights

This duty requires the CEHR to do more than explain or clarify what human rights are. It specifically mandates the Commission to promote the *importance* of human rights values and standards.

2. Duty to promote awareness, understanding and protection of human rights

The CEHR will be required in all the work it does to promote awareness and understanding of human rights values and standards. For example, in its public education campaigns, its work with schools, its inquiries. But it will also be required to promote protection of human rights, which mean encouraging good practice and compliance (see below).

3. Duty to encourage public authorities to comply with their obligations under the HRA, s6.

The CEHR will be specifically required to provide guidance to public authorities on the implications of HRA case law which often extend beyond the public authority and specific facts raised by a particular case in ways not immediately

transparent. I have called this power *smart compliance* because it involves working with public authorities and their auditing or inspection bodies to ensure that the implications of case law for public policy and practice are understood by all affected bodies. For example:

- The *Bernard* case⁴ concerned a severely disabled woman and her husband-carer, who had been left in unsuitable accommodation for 20 months after a care plan had stated that they needed assistance to move to a suitably-adapted property. This case is not just about unsuitable housing but has implications for other situations where undue delays breach a person's human rights.
- The *East Sussex* case⁵ concerned two disabled young women who challenged the local authority ban on care staff lifting them manually. The High Court provided a framework for local authorities to balance the conflicting interests of the dignity of the individual with the health and safety of employees.
- The *Amin* case⁶, which was brought by the uncle of Zahid Mubarek, who was killed by his cellmate while detained in a Young Offenders Institution. The court ruled that the right to life involves an obligation on the state to thoroughly investigate a death in a body under its control. This case has implications for inquiries into deaths in other public institutions.
- The '*Prison Babies*' case⁷ challenged a prison service's policy prohibiting babies from remaining in prison with their mothers once they had reached the age of 18 months. The case is not just about prisons but about rigid, blanket policies.

⁴ R v Enfield London Borough Council, ex parte Bernard [2002] EWHC 2282 (Admin)

⁵ R v (1) East Sussex County Council (2) The Disability Rights Commission (Interested Party), ex parte A, B [2003] EWHC 167 (Admin)

⁶ R (On the Application of Imtiaz Amin) v Secretary of State for the Home Department [2003] UKHL 51

⁷ R v Secretary of State for the Home Department, ex parte P, R v Secretary of State for the Home Department, ex parte Q [2001] EWCA Civ 1151

4. *Duty to encourage good practice in human rights*

This duty has two broad implications. First, in carrying out this duty the CEHR can draw on standards and principles in international treaties such as the United Nations Convention on the Rights of the Child, or the UN Race and Gender Conventions⁸ to encourage authorities to go beyond mere compliance with the HRA. Second, 'good practice' can be encouraged in the private as well as the public sector. All law is now interpreted by the courts to comply with the HRA "so far as it is possible to do so"⁹, and this can include private law. For example, in the case of *Ghaidan v Godin-Mendoza*, the House of Lords interpreted the Rent Act 1977 Sch.1 para.2 so that it was compliant with rights in the European Convention on Human Rights.¹⁰ The court said the relevant section of the Act should be read, and given effect, as if the survivor of a homosexual couple who had lived together *were* the wife or husband of the original tenant, to allow the surviving partner to 'inherit' the tenancy. Such cases should be used to encourage public authorities, care providers, landlords and so forth to look at discriminatory or unfair practices in the provision of goods and services in advance of specific legislation and not wait for the courts to find against them. The CEHR would advise on the implications of good practice for such decisions.

5. *Power to undertake inquiries into the protection, good practice or understanding of human rights by public authorities*

It will be possible for the CEHR to undertake an inquiry which is purely confined to a human rights issue, such as the right to protest or to free speech, but it is hard to imagine, given its priorities and resources, many circumstances in which the CEHR would choose to do so. More likely would be an inquiry into care of the elderly, for example, whose terms of reference might include evidence of the protection or understanding of human rights - such as dignity, privacy or right to family life – by care homes. This immediately raises the issue

⁸ UN Convention on the Elimination of All Forms of Racial Discrimination and UN Convention on the Elimination of All Forms of Discrimination against Women, respectively.

⁹ HRA s3(1).

¹⁰ [2004] UKHL 30

of the *Leonard Cheshire*¹¹ decision and whether such an inquiry would be limited to public authorities as they were narrowly defined in that case. As the human rights duties promoting good practice and protection are not confined to the HRA, I see no reason why it should be. Indeed I can also envisage an inquiry into the implications for elderly, young and disabled people of the current definition of public authority under the HRA or a considered recommendation to the government to amend the HRA to restore the definition to the original, functional intent of the Act, as part of the CEHR's statutory responsibility to keep the HRA under review.

6. *Power to seek leave to intervene in cases in which human rights are being argued*

This power is already used successfully by the Disability Rights Commission in Human Rights Act cases, even though they have no specific HRA remit. For example, the DRC intervened in the *East Sussex* case on manual handling (above), and more recently in the case of *Burke*.¹² This was a judicial review of General Medical Council guidance on the circumstances in which artificial nutrition and hydration can be withdrawn. It led the court to rely on the HRA to imply that the right to life and right of individual autonomy should take priority over NHS resources or efficiency. These cases illustrate well the 'value added' of human rights. Discrimination is not always at the heart of unfair or unjust treatment and it can sometimes be very difficult to prove without a 'comparator' group. It is not a human rights principle to treat all groups equally badly.

The DRC has intervened in cases which establish the importance of respect, dignity and fairness as well as equal treatment. For example, in *Price*¹³ (concerning a lack of adapted facilities for a disabled person in prison) and *East Sussex* the courts drew on the ECHR case of *Botta v Italy*¹⁴ to emphasise that in order to avoid discriminating it is sometimes necessary to treat people in

¹¹ (1) Elizabeth Heather (2) Martin Ward (3) Hilary Callin v (1) Leonard Cheshire Foundation (2) HM Attorney-General Sub [2001] EWHC Admin 429

¹² R (Burke) v General Medical Council [2004] EWHC 1879 (Admin). On appeal to the Court of Appeal.

¹³ Price v UK (2001) 34 EHRR 1285

¹⁴ (1998) 26 EHRR 241

different circumstances differently precisely because their situations are not comparable, rather than treat everyone the same. These cases have also established that, to avoid breaching the HRA, governments can have 'positive obligations' to provide or alter facilities in order to meet particular needs.

The CEHR will not be empowered to support or take free-standing HRA cases. This was a controversial decision but one that was backed by the Joint Committee on Human Rights (JCHR)¹⁵, amongst others,¹⁶ concerned that the volume of requests for such cases could fatally dilute the strategic focus and message of the body. Nor will it have the power to judicially review public authorities on HRA grounds alone¹⁷ as this would require an amendment to the HRA, which the JCHR would favour.¹⁸

Conclusion

In the CEHR we should have a body that not only makes sense of and explains the HRA but can give practical advice and guidance to public authorities on the difficult every-day dilemmas front line workers, as well as policy officers and managers, frequently face.

The inclusion of human rights in the single Equality Body, it is now increasingly accepted, has the potential to transform the vision of the new CEHR from an anti-discrimination regulatory body for 6 strands or groups of people, to a body which promotes and champions equality as a fundamental human right for all, alongside other internationally recognised human rights. The broad array of human rights powers adds to the tools available to the CEHR to achieve its main purpose as a catalyst for social change

¹⁵ *Commission for Equality and Human Rights: The Government's White Paper*, Sixteenth Report, 2003-04 Session at p15.

¹⁶ Such as the human rights organisation Liberty.

¹⁷ CEHR will have 'standing' to institute judicial review proceedings on other grounds in the course of which breaches of the HRA can be cited.

¹⁸ Above, n.15 at p14. HRA s7 limits 'standing' under the HRA to 'victims' of HRA breaches only.